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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

RON and BARBARA McCALL,)	
)	PCHB No. 93-131
Appellants,)	
)	ORDER MODIFYING
v.)	OPINION AND DENYING
)	RECONSIDERATION
PUGET SOUND AIR POLLUTION)	
CONTROL AGENCY,)	
)	
Respondent.)	
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The Pollution Control Hearings Board ("Board") heard this case on April 4, 1994, in the Board's office in Lacey, Washington

Lenore Schatz of Gene Barker & Associates, Inc. of Olympia, recorded the proceedings.

Ron McCall represented himself. The Puget Sound Air Pollution Control Agency ("PSAPCA"), was represented by Laurie S. Halvorson, General Counsel.

The Board was comprised of Robert V. Jensen, presiding; and Richard C. Kelley and James A. Tupper.

The Board heard sworn testimony, reviewed exhibits and closing argument. Based thereon, the Board enters these:

FINDINGS OF FACT

I

Mr. McCall works for the Boeing Company. More than three years ago, he and his wife purchased a little less than seven and one-half acres of pasture land near and to the north of Shady Lake. The property lies in King County, to the southeast of Renton. The property lies in Fire District #40.

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2 II

3 Across the road from the McCall property is Shady Lake. It is ringed by residential
4 uses. The lots on the north side are small; those on the south side vary from 1 to 20 acres in
5 size.

6 III

7 Mr. McCall generally buys cattle in the Spring, and sells them to feed lots in the Fall.
8 He has had as many as seven cattle on the property at one time. Currently, he has three horses
9 on the property, which is the most he has ever had. His business is for profit, although he had
10 tax losses for three years. In 1993, he made a profit on the operation.

11 IV

12 Up until September 1992, Mr. McCall obtained monthly burning permits from Fire
13 District #40, during eight months of the year, to burn tansy ragwort, blackberries, and fallen
14 limbs from trees on the property.

15 V

16 The lots in the vicinity of the McCall's property, abutting the lake road on the north,
17 are similar in size to the McCall property. Some of them have horses on the property; some
18 have cattle.

19 VI

20 The McCalls do not sow crops on their property, but rather they use grasses and native
21 vegetation for pasture.

22 VII

23 The Legislature, in 1991, passed a new law creating a limited outdoor burning
24 program.

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2 **VIII**

3 Fire District #40, which encompasses about 13 square miles, on September 1, 1992,
4 stopped issuing fire permits throughout the district

5 **IX**

6 PSAPCA, on November 20, 1992, received a letter from Washington State University
7 Cooperative Extension Service ("WSUCES"), outlining how that agency would assist
8 PSAPCA in implementing its new burning permit regulations. The letter stated that staffing
9 limitations would not allow the agency to visit every farm seeking a permit. The letter
10 outlined conditions under which that agency might recommend burning. These included
11 removal of noxious weeds for pasture management.

12 **X**

13 On March 11, 1993, Mr. McCall filled out an application to PSAPCA for an
14 agricultural exemption from the general prohibition against outdoor burning.

15 **XI**

16 Stanley Moe, the Fire Marshal and Battalion Chief in charge of fire prevention, for
17 Fire District #40, subsequently visited the site. He concluded that the request for burning did
18 not meet the agricultural exemption. He testified that even if PSAPCA were to issue an
19 exemption, he would direct the fire district to put the fire out if he considered it to constitute a
20 nuisance. Based on that inspection, PSAPCA sent Mr. McCall a letter, dated: April 28, 1993,
21 denying the exemption. The letter did not advise Mr. McCall of his right to appeal to this
22 Board.

23 **XII**

24 On May 25, 1993, Richard J. Gribbon, a PSAPCA inspector visited the site, after
25 reviewing Mr. McCall's application for the agricultural exemption. He observed livestock and
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2 horses grazing in the pasture. He reviewed the November 20 letter from the WSUCES and
3 concluded that the letter was not a site-specific determination of whether burning constituted
4 the best management practices under PSAPCA's limited burning regulation. Seeing the
5 livestock grazing, Mr Gribbon concluded that noxious weeds were not present in a quantity to
6 justify burning.

7 XIII

8 PSAPCA, on May 28, 1994, sent Mr. McCall a second and final letter of denial of the
9 agricultural burning exemption. The reason stated for the denial was that: "[i]t is not the best
10 management practice as stipulated in Regulation I, Section 8.02(c)". The letter also offered to
11 reconsider the decision, if Mr. McCall could provide additional documentation supporting an
12 agricultural exemption at his specific site. This denial informed Mr. McCall of his right to
13 appeal to the Board.

14 XIV

15 On June 18, 1993, an extension agent for WSUCES, wrote Mr. McCall, giving written
16 approval for a burning permit; on the grounds that burning was necessary to remove noxious
17 weeds and debris. The agent was not called by Mr. McCall to testify at the hearing. Mr.
18 McCall testified at the hearing that he had no personal knowledge whether the agent ever
19 visited the property. The letter was not submitted to PSAPCA.

20 XV

21 Mr. McCall appealed the denial to this Board on June 24, 1993

22 XVI

23 Any conclusion of law deemed a finding of fact is hereby adopted as such. From these
24 findings of fact, the Board makes the following:
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2 **CONCLUSIONS OF LAW**

3 **I**

4 The Board has jurisdiction over these parties and the subject matter RCW
5 43.21B.310(1); Ch. 70 94 RCW

6 **II**

7 RCW 70.94.743(1), which was adopted in 1991, affirms that it is "the policy of the
8 state to reduce outdoor burning to the greatest extent practical".

9 **III**

10 RCW 70.94.745, also adopted in 1991, declares that:

11 [i]t shall be the responsibility and duty of the department of natural resources,
12 department of ecology, department of agriculture, fire districts, and local air
13 pollution control authorities to establish, through regulations, ordinances, or
14 policy, a limited burning program for the people of this state, consisting of a
15 one-permit system, until such time as alternate technology or methods of
16 disposing of the organic refuse have been developed that are reasonably
17 economical and less harmful to the environment. It is the policy of this state to
18 foster and encourage development of alternate methods or technology for
19 disposing of or reducing the amount of organic refuse.

20 **IV**

21 RCW 70.94.650(1)(a) and (c), likewise were adopted in 1991. They require anyone
22 proposing to set fires in the course of weed abatement or agricultural activities, to obtain a
23 permit from the local air pollution control authority, or the Department of Ecology; prior to
24 burning for weed abatement, or agricultural purposes. The statute further requires the
25 applicant to:

26 show that the setting of fires as requested is the most reasonable procedure to
27 follow in safeguarding life or property under all circumstances or is otherwise
28 reasonably necessary to successfully carry out the enterprise in which the
29 applicant is engaged, or both.

30 Id.

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V

The statute requires applications for such permits to be acted upon within seven days of the date of filing of the application. Mr. McCall seems to argue that PSAPCA's failure to deny the permit within seven days entitles him to a permit. His argument is not persuasive. The established law is that, unless a statute specifically requires approval of a permit within a specific time, the failure of the agency to act in that time does not cause it to forfeit its power to render the decision. Indeed, the permit is not granted until the agency approves it. The remedy for inaction is a suit in mandamus in court. Even if a mandamus is sought, the court will not direct how the agency must act, but only that it must act. Vangor v. Munro, 115 Wn.2d 536, 543, 798 P.2d 1151 (1990).

VI

This same statute, provides that it does not relieve the applicant from obtaining other "permits, licenses, or other approvals required by any other law". Id. RCW 70.94.780 mandates that fire protection agencies "shall regulate or prohibit outdoor burning as necessary to prevent or abate the nuisances caused by such burning"

VI

RCW 70 94 755 commands each activated air pollution control authority to establish a program through regulations, consistent with the limited burning policy. RCW 70.94 650 mandates the same, in regard to implementation of the permission of agricultural burning.

VII

PSAPCA Regulation I, Section 8.02(c)(2), which was adopted pursuant to the above laws, allows an exemption from the prohibition of outdoor burning, for:

Fires associated with agricultural activities for controlling diseases, insects, weed abatement or development of physiological conditions conducive to

1 increased crop yield, provided written confirmation has been furnished by a
2 designated county extension agent or agricultural specialist designated by the
3 Cooperative Extension Service that burning is the best management practice,
and prior approval written approval has been issued by the Control Officer.

4 VIII

5 Within the framework of the above laws, it appears that the agricultural exemption
6 must be narrowly confined. Mr. McCall did not present credible evidence: either that
7 burning was necessary to increased crop yield, or that burning was the best management
8 practice for this property. The letter from the extension agent is hearsay, which was not
9 corroborated by any expert testimony. We have no evidence that the agent investigated the
10 site. We can only speculate what PSAPCA would have done had the extensionist stated that
11 he had inspected the property personally, and had given some reasons for issuing the
12 exemption, that were specifically related to this particular piece of property. We are not
13 inclined to accept such evidence as probative, in light of the strong policy statements in state
14 law that call for significant reduction of outdoor burning.

15 IX

16 Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From
17 the foregoing, the Board issues this:

18 ORDER

19 PSAPCA's denial of Mr. McCall's application for an exemption from the prohibition
20 of outdoor burning is affirmed
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3 On April 25, 1994, appellant Ron McCall, representing himself, filed a petition to
4 Reconsider the Board's final order in this matter

5 Having considered the request and having reviewed the file and record herein and being
6 fully advised,

7 NOW THEREFORE, IT IS ORDERED with the exception of changing the last word of
8 line 21 on Finding of Fact XV to "1993", the request for reconsideration is denied

9 POLLUTION CONTROL HEARINGS BOARD

10 
11 ROBERT V. JENSEN, Presiding Officer

12 
13 RICHARD C. KELLEY, Member

14 
15 JAMES A. TUPPER, Member

16 P93-131F

17 DONE this 27th day of April, 1994